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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND
J. A. JONES CONSTRUCTION COMPANY,
Petitioners,

vs.

MRS. FANNIE M. FLOWERS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FANNIE M. FLOWERS,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

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AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY,

Petitioners,

vs.

MRS. FANNIE M. FLOWERS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Motion to Dismiss the Petition for Certiorari

Respondent moves the Court as follows:

1. To dismiss the Certiorari Petition because, in response to the mandate of the Circuit Court of Appeals (6th Circuit), the district court entered an order remanding the case to the state court which was executed, and the state redocketed and reasserted jurisdiction, the federal court exhausted its jurisdiction, and is without statutory authority to again remove the case into the federal court; said motion is supported by certified copy of the order on file in

the state court, here attached as Exhibit "A" in the Appendix of this brief.

2. Because since the opinion was handed down by the Circuit Court of Appeals the defendants, now petitioners, filed a plea in abatement in the state court as shown by Exhibit "B" in the Appendix; and later after the execution of the mandate and the redocketing in the state court, the defendants proceeded with the taking of depositions in the case in the state court by stipulating with counsel as shown by Exhibit "C" attached thereto in the Appendix. These steps were inconsistent with the retention of jurisdiction in the Federal Court and respondent can hardly be expected to practice in separate courts at the same time in one litigation.

3. Because there is no special or important reason of a general public interest why this Court should exercise its discretion and entertain a review of this case, for the purpose of construing a State Statute, upon a question of practice, with only a local application to only one state in the United States.

FANNIE M. FLOWERS,
Respondent.

Brief on Motion to Dismiss

Pickwick-Greyhound Lines v. *Shattuck* (C. C. A. 10) 61 Fed. (2d) 485; *Ausbrooks* v. *Teleg. Co.* (D. C.) 282 F. 733 (Sanford, J.) Simkins Federal Practice, Sec. 1133.

II

Reply Brief to Merits of Petition

The Circuit Court of Appeals sustained the third ground assigned in the motion made in the district court to remand to the state court, raising the question of the jurisdictional

amount, and pretermitted the other issues raised in the motion as well as the issue of venue. Respondent has filed no petition seeking a review of these pretermitted issues, but understand she can assert these grounds in this Court in support of the Court below, for so long as its decision is correct upon any ground it will not be disturbed. Following this practice the respondent answering the petitioner's assignment, then advances the grounds assigned in respondent's motion to remand, as additional support of the Circuit Court of Appeals' decision.

There is but one Specification of Error assigned which is that the Circuit Court of Appeals erred in holding that the District Court lacked jurisdiction of the cause and said cause was improperly removed.

Respondent is content to rely, in reply to this Specification, upon the opinions and citations therein, of the Circuit Court of Appeals in disposing of the appeal and motion to rehear (Opinion, Record pps. 19-23).

Opinion on Motion to Rehear, Record, p. 29

We feel the opinions and citations are exhaustive enough to fully develop the issue raised, and any further elaboration on our part would only add additional labor on the Court. However, petitioner has advanced some new matter in his supporting brief that will be noticed.

He cited certain entered judgments of Tennessee cases, picked at random as he states, as establishing the conclusion that the Supreme Court of Tennessee has construed the Tennessee Compensation Act, as authorizing a decree for the full amount due before maturity. We resolutely deny that his argument and conclusions are sound. The cited decrees were drawn by counsel and do not reflect a considered interpretation of the Act, and amount only to a declaration of the present and future right of recovery in the event any future right of recovery materializes.

He insists the legal question presented on this specification of error has never been directly or indirectly presented and passed upon by the Tennessee Supreme Court in the cases cited or in any other case. And in the absence of a direct adjudication of the question at issue by the State Supreme Court, inferences that might be drawn from decrees drafted by counsel will not be persuasive upon this Court.

And the citations of excerpts of disconnected sections of the Code are misleading, especially in dealing with the jurisdiction of three state courts, *i. e.*, Chancery, Circuit, and County Courts, the last named being a court of limited and statutory jurisdiction; all three of said courts entertaining under the Act, jurisdiction, but not identical jurisdiction. Some of these courts exercise certain jurisdiction the others can not. The citation to the disconnected sections of the Code are not in point because not dealing with the jurisdiction of the Chancery Court, which forum respondent selected as is her right under the statute.

The Circuit Court of Appeals construed this Tennessee Act correctly. The Act is local and there is no question of general importance presented requiring the attention of the Supreme Court of the United States to review its action under *Supreme Court Rules, 38, sub. sec. 5.*

And in additional support of the opinion of the Circuit Court of Appeals respondent relies upon the other grounds of motion to remand assigned in respondent's appeal but pretermitted by the Court, being four in number, and the first, second and fourth being pretermitted.

(1) This is not a removal suit, because not one of a civil nature in law or equity; and the Federal District Court has no original jurisdiction of the subject matter (U. S. Code, title 28, sec. 41; id. 71).

"Section 28 of Judicial Code, makes a radical change in the right of removal by confining it to those suits

that could have been originally brought in the Federal Courts, and in which four things are necessary: First: The suit has to be one of a civil nature in law or equity * * *."

Simkins Fed. Practice, sec. 1096

"The test of removability of a cause from a state to a federal court is whether the action could have been originally brought in the federal court."

Moon v. *Pacific Mutual Life Ins. Co.*, 28 Fed. Sup. 199.

The State Supreme Court has held: "These actions cannot be classified as in either tort or contract . . ."

Chambers v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533.

They are not founded upon equitable principles entitling plaintiff to recover upon a maxim in equity. Jurisdiction of this character of a case under English law came under the Ecclesiastic Courts which had jurisdiction of probates, divorce, guardian and wards, bastards, and the administration of pious gifts. The federal courts do not assume jurisdiction of cases arising under the English Ecclesiastic Courts since they are not of a civil nature in law or equity.

The Tennessee Supreme Court construes this statute as one to relieve society from the burden of dependency and it is primarily, if not solely, a poor law; analogous to a bastardy proceeding or the administration of a pious gift.

"'The Workmen's Compensation Act is not a statute of descent and distribution. It is intended to relieve society of the burden of caring for injured workmen or the dependents of deceased workmen, and to place that burden upon the industry employing the workman. In case of the workman's death the law makers were concerned for the care of his dependents, not about the devolution of the workman's property. The dependency of a claimant is the true basis of his right

to compensation rather than blood or marriage. Relationship is really only evidence of dependency.

Portin v. *Portin*, 149 Tenn. 580, 261 S. W. 362;
Franklin v. *Stone-Webster*, — Tenn. —, 191 S. W. (2) 431.

At common law no one had a cause of action against an employer for an accidental injury to an employee. And no one has such cause of action in this State to this day, but by an optional law creating a cause of action by agreement and adoption of the Compensation Act by the employer and employee; and the jurisdiction is cast upon the court by the agreement between the parties, as in statutory arbitration. The Legislature has no authority to confer jurisdiction upon the Federal Courts when they have no jurisdiction, nor can the parties by a voluntary agreement confer jurisdiction upon the Federal Courts.

> "The courts have generally construed the statute so as to give injured employees every benefit which it was reasonably intended to confer, the object of the statute being to prevent injured workmen from becoming public charges."
>
> *Griffith* v. *Goforth*, — Tenn. —, 195 S. W. (2) 33 at 37.

(2) The Act establishes a peculiar or special procedure in the state courts for determining the controversy contrary to the established procedure in an action of a civil nature at law or in equity, requiring the exercise of administrative powers and defining the courts to administer the law; the parties voluntarily agreed to the jurisdiction to these courts when none of whom had such jurisdiction under the law of the land, and by accepting the Act and working under it all the parties were entitled to its benefits and bound by its provisions.

". . . such statute is elective, and where the employee accepts the provisions of the statute, he accepts the remedies therein provided and is bound by them."

Mitchell v. *Usilton*, 146 Tenn. 419, 242 S. W. 248.

"Employer accepting the State Workmen's Compensation submitted to jurisdiction of the state court and could not invoke the jurisdiction of the federal court for diversity of citizenship.

"Employer having voluntarily brought himself within state court's jurisdiction in compensation proceedings, cannot invoke the jurisdiction of the federal court."

Elsas v. *Montgomery Ele. Co.*, 38 Fed. (2d) 303.

"Proceedings under Illinois Workmen's Compensation Law held not removable to the federal court."

Snooks v. *Industrial Comm. of Ill.*, 9 Fed. Sup. 26.

(4) The statutory notice of the intention to file a petition for removal required to be given prior to the filing of the petition was not given.

Defendants' attorney mailed the petition and notice to the Clerk and Master for filing May 28, 1945, and on the same mail a copy to plaintiff's attorney located at the same place. It was received in due course through the mails May 29, 1945, at 10:30 A. M. The notice stated that at 9:00 o'clock A. M. May 29, 1945 (at a time prior to receipt of the notice), or as soon thereafter as counsel can be heard he would present it to the Chancellor at Chambers in Clinton, Tennessee. It was presented at some unknown date and the order filed with the Clerk and Master for entry on June 5, 1945, as shown by the C. & M.'s notation thereon (Notice, Record p. 7).

Order of Removal, Record p. 9

Plaintiff's attorney had no legal notice prior to the filing of the petition, nor of the application for the removal at any time.

The statute conferring Chambers jurisdiction provides, in case the parties do not consent, "then the parties desiring such action shall give notice in the same manner as provided in the matter of motions to dissolve injunctions". Code of Tenn., sec. 10499.

Five days notice shall be given defendant or his counsel of application to dissolve injunctions at Chambers. Code of Tenn., sec. 10547.

In the absence of required notice the Chancellor has no jurisdiction to act at Chambers.

James County v. *Hamilton Co.*, 89 Tenn. 237, 14 S. W. 601.

The Federal rules require five days notice, and when served by mail three (3) additional days.

Fed. Rules of Civil Procedure, Rule 6 (d), (e).

"The statute (Jud. Code. sec. 29) requires notice of filing petition and bond for removal to be given prior to the filing of the same; . . . . The rule as to notice is mandatory."

Simkins Federal Practice, 3rd Ed., sec. 1034;
Arthur v. *Maryland Casualty Co.*, 216 Fed. 386;
Loland v. *N. W. Stevedore Co.*, 209 Fed. 626.

"Notice of intent to file the petition and bond is imperative; if notice is not given, the case should be remanded."

Simkins Federal Practice, 3rd Ed., sec. 1034;
Arthur v. *Maryland Casualty Co.*, 216 Fed. 386;
Frazier v. *Hines*, 260 Fed. 874;
Cropsey v. *Sun P. & Pub. Co.*, 215 Fed. 133.

BRIEF ON QUESTION OF VENUE

In the event this Court is of the opinion that the Federal Court does have jurisdiction of this issue in litigation, that the Circuit Court of Appeals was in error in holding the jurisdictional amount not present, and that respondent's additional insistences are without merit, then respondent respectfully submits that the District Judge was in error in dismissing the complaint for lack of venue of the person and that this Court should take proper steps to correct the same, whether by its own opinion or by remanding to the Circuit Court of Appeals.

1. The plaintiff, now respondent, can and does admit the truth of the allegations of the motion, that the defendant J. A. Jones Construction Company was not doing business in Hawkins County where the suit was instituted and it maintained no office or agency there upon whom to serve process. However, the motion was silent as to the status of the co-defendant Aetna Casualty and Surety Company and the bill alleges that this co-defendant did business and maintained an office and/or agency in Hawkins County, and process was served upon this agent. The bill prayed for a counter-part summons to Knox County for service upon the officer or agent of the Construction Company, which was had.

The pleading—motion—raised only the question as to the venue of the defendant Construction Company and was silent as to the other defendant, but asked that both defendants be dismissed.

This action is transitory (*Chambers* v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533) and the cause of action is against both defendants for a liability that is several and joint. (Code sec. 6852(a); *Oman* v. *Delius*, 162 Tenn. 192, 35 S. W. (2d) 570; Code sec. 6898.) And the compensation statutes

expressly provide: "Said summons shall be served on the defendant as in other civil cases. . . ." (Code sec. 6885). Plaintiff followed the indicated course and served process upon a material defendant in Hawkins County with a counter-part summons to the resident county of the other defendant.

The act also provides as to venue as follows: "The party filing the petition may, at his option, . . . file the same as an original petition in either circuit, criminal, or chancery court of the *county in which petitioner resides* or in which the alleged accident happened . . ." (Code sec. 6885).

The State Supreme Court in construing this section as to venue held: "The territorial jurisdiction must be controlled by the laws which generally regulate venue. The provisions of the act touching venue, authorizing a suit in the county in which petitioner resides or in which the alleged accident happens are not exclusive" (*Chambers* v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533). In other words the court held that a material defendant must have an agent in the county where the accident happened or the petitioner resides in order to bring the defendant before the court, as required under the general law.

The general law referred to is codified in Code secs. 8640, 8643, and 8669; 8653. And these sections were analyzed by Judge Carothers in his classic book on practice, "History of a Lawsuit", 4th Ed. page 51, as follows:

> "As to pure transitory actions the person of the corporation is split into as many places as the corporation has offices, agencies, and directories; and such actions, for any cause arising out of the business of the corporation, may be brought in any county where the corporation has an office, agency, or resident director. And this is so whether the cause of action arose out of business conducted by the local office, agency, or di-

rector, or out of business of the corporation in the particular county where the suit is brought or not . . .

"The plaintiff may wish to sue several persons as defendants in the same suit, and they may not all reside in the same county in which he proposes to bring his action. In that case he is entitled to have an *original* summons issued to the county of the venue for such defendants as may reside or be found there and *counter-part* summons to any counties in the State where he supposes the other defendants may be found . . ."

The case relied upon by the defendants in support of their motion and which they insist makes the above holdings inapplicable is *Brown* v. *Stone and Webster*, 181 Tenn. 293, 181 S. W. (2d) 148, but we respectfully submit this case is in no way in conflict with the cited authority and strongly reaffirms the holding. In the case relied upon by the defendants there was no one residing in the county of the petitioner's residence representing a material defendant upon whom process could be served. The case holds:

"'The whole matter comes down to this; with certain exceptions, a transitory action can be brought in any jurisdiction in which the defendant is found. Code sec. 8640. Such an action, however, cannot be brought, in personam, in the jurisdiction in which the defendant is not to be found. A corporation, an artificial person, is not to be found in any jurisdiction or county unless the corporation maintains an office, agency, or resident director in that county.'"

The only exception is stated to be where the employer and employee submit a dispute for compensation "to the county judge or chairman of the county court in which the accident occurred" this proceeding is localized. However, this holding does not have the effect of localizing the other actions provided by the act, and overruling the repeated holdings of the Supreme Court that the action under this statute is transitory. To hold that all actions were localized to the

county of the accident would arbitrarily eliminate the quoted provisions of the act that the summons should be served as in other civil actions and that the suit might be instituted in the county of the petitioner's residence. This local action is restricted to where the dispute is submitted by the employer or employee to the judge or chairman of the county court of the county of the accident, as held in the case establishing this exception of *Bordens Mills, Inc.* v. *Manis*, 173 Tenn. 440, 121 S. W. (2d) 523-4.

This is a transitory action.

> "They are inherently transitory."
> *Chambers* v. *Stanford, etc.*, 154 Tenn. 134, 289 S. W. 533.

Petitioner may bring suit against the insurer alone.

Hartford Acc. etc. v. *Hay*, 159 Tenn. 202, 17 S. W. (2d) 904;

Central Surety, etc. v. *Court*, 162 Tenn. 477, 36 S. W. (2d) 907.

This action may be maintained against the employer and the insurer jointly.

Mutual Liability v. *Patrick*, 157 Tenn. 618, 11 S. W. (2d) 872.

Notwithstanding the above authorities sanction suit against the defendants separately or jointly, the district judge in his memo opinion says:

> "Under the Workmen's Compensation Act the employer may be sued where the accident occurred or elsewhere, as provided in the Act, where the employer has an office or place of business, but the employer may not be brought into a county where he has no officer or agent or place of business by serving process upon the insurer. The insurer may be sued under the act where the insured may be sued, but the insured may not be

brought into the insurer's venue by counter-part process."

His conclusion that insured could not be brought into insurer's venue by counter-part process is a holding of first impression. No case can be found in support and the holding established a favorite status for the insured, exempting it from the general law of the land in reference to venue, and it also exempts the insurer from suit in a county where it does business and maintains an agency. Both defendants are given a favorite status of exemption from the provisions of the general statutes of venue in a transitory action.

We must assume that the Judge adopted the insistence of the defendants that a proper construction of a sentence of the Act codified in section 6892, para. 4, justifies this conclusion. The said sentence reads as follows:

> "All policies insuring the payment of compensation under this act, . . . must contain a clause to the effect that as between the employer and the insurer or insurers the notice to our (sic) knowledge of the occurence of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; *that jurisdiction of the insured for the purposes of this Act shall be jurisdiction of the insurer or insurers;* . . ." (Italics supplied.)
>
> Code Sec. 6885, para. 4.

This section deals with the contents of the policy or contract between the insurer and insured; it does not attempt to fix the venue of the employee's cause of action. The Act in another section expressly takes care of the venue where it provides:

> "Said summons shall be served on the defendants as in other civil actions . . ."
>
> Code Sec. 6885, para. 2.

In construing the Act a construction should be given it to constitutional requirements if possible.

The Judge's construction is unconstitutional for it is a suspension of the general law for the benefit of the defendants and is inconsistent with the general law of the land and directly in violation of Article 11, sec. 8 of the State Constitution.

And the holding in contrary is the holding of the State Supreme Court which has construed the act without special favor and held that the general law in reference to venue is applicable. It is the duty of the district court to follow the state court's construction.

As authority for the unconstitutionality of the district Judge's conclusion in the construction of the state statute, the following case in point is cited.

Town of McMinnville v. *Curtis*, — Tenn. —, 192 S. W. (2d) 998.

2. Had the position of the defendants been well founded, we think under the facts of this case, the court should have applied the rule of "*forum non conveniens.*" The plaintiff is a very poor person, she could attend court with her witnesses in an adjoining county where the district court is held without too great inconvenience, but the purpose of this motion on venue was to require her to journey to a distant county (Roane) and refile her bill before the same chancellor in order that the defendants might remove the case before the same federal judge sitting at Knoxville, Tennessee, which circumlocution was of no benefit to the defendants, except the case will be tried in the home town of the defendant's attorney.

Williams v. *Green Bay & W. R. Co.*, — U. S. —, 66 S. Ct. R. 284.

The rule especially should apply, if the federal courts have statutory jurisdiction, when the plaintiff could have instituted her suit, under the federal statutes, in the federal court of the division from which she was repelled, the question of diversity of citizenship being the sole ground of removal.

> "Suits shall be brought only in the district of the residence of either the plaintiff or the defendant."
> 28 U. S. C. A. sec. 112.

Conclusion

In concluding this brief on behalf of the respondent, counsel thinks it appropriate to make this observation.

Opposing counsel in his petition for certiorari states that "numerous Workmen's Compensation cases are now pending in the Federal District Courts of Tennessee" and that this demonstrates the importance of this Court taking jurisdiction in order that the doors of the Federal Courts shall remain open in cases of this character. We think otherwise and that the public interest would be better upheld by a denial of this petition. The statement above that numerous cases are pending is emphatic in showing the harassment pauper litigants are subjected to in seeking to obtain the benefits of a state statute designed to relieve society of the burden of caring for injured or deceased workmen's dependents. Most of them are represented by counsel with very little experience with the practice in the federal courts and this procedure of removal is productive of an inducement on the part of the pauper to seek to avail himself of the compromise provisions of the Act in preference to trying the case on the merits, to his detriment and to the advantage of the insurer, who is paid to compensate the pauper for injuries sustained in industry and the burden

of preventing the dependent from becoming a public charge falls again upon the public.

It is respectfully submitted that the petition for certiorari be denied.

FANNIE M. FLOWERS,
Respondent.

PORTRUM & PORTRUM,
Counsel for Respondent.
By HAL E. PORTRUM,
Rogersville, Tennessee.

APPENDIX

Exhibit "A" to Motion to Dismiss Certiorari Petition

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

Filed 17 day of July 1946. Ent'd Civil Order Bk. 3, p. 70. Carroll Cate, Clerk. By Eva Lee, Dep. Clk.

Civil Docket No. 262

MRS. FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY Co. et al.

Rec'd and Filed July 25th, 1946. (Signed) Juno G. Altom, C. & M.

ORDER OF REMAND

This day came the plaintiff and presented in open court the mandate of the United States Circuit Court of Appeals for the Sixth Circuit, heretofore filed herein, and moved the Court to remand this case to the Chancery Court of Hawkins County, Tennessee;

And it appearing from said mandate that the said Circuit Court of Appeals has directed that this case be remanded to the said Chancery Court it is accordingly ordered that said motion of the plaintiff be and the same is hereby granted, and that this cause be and the same hereby is remanded to the Chancery Court of Hawkins County, Tennessee, for further proceedings.

It is further ordered that the plaintiff have and recover of the defendants and surety on their removal bond, the costs incurred in this court, for which execution is awarded.

To the said action of the Court in remanding this case as aforesaid the defendants excepted and now except.

Approved for entry:

(Signed) GEO. C. TAYLOR,
District Judge.

(S.) PERTRUM & PORTRUM,
Counsel for Plaintiff Rogersville.

(S.) CLYDE W. KEY,
Counsel for Defendants.

7-8-46.

Attest: A true copy. Certified this July 17, 1946.

CARROLL CATE,
Clerk,

(Signed) By EVA LEE,
Deputy Clerk.

[SEAL.]

I certify that the foregoing is a true copy of order to remand filed in the Chancery Court for Hawkins County, Tenn., July 25th, 1946, in the cause styled Fannie M. Flowers vs. Aetna Casualty & Surety Co. et al. This July 30, 1946.

(S.) JUNO G. ALTOM,
Clerk & Master.

[SEAL.]

EXHIBIT "B"

IN THE CHANCERY COURT FOR HAWKINS COUNTY, TENN.
No. 1565.

MRS. FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

Filed April 19th, 1946. (Signed) Juno G. Altom, C. & M.

PLEA IN ABATEMENT

The defendants Aetna Casualty & Surety Company and J. A. Jones Construction Company, for plea in abatement say:

1. That the accident alleged by complaintant to have resulted in the death of her husband, Edward E. Flowers, occurred in Roane County, Tennessee, where the said Edward E. Flowers was regularly employed by defendant J.

A. Jones Construction Company; that at no time has the defendant J. A. Jones Construction Company engaged in business in Hawkins County, Tennessee, nor had therein any officer, director, agent or any other person upon whom leading process might lawfully be served in said County. Upon the date of said alleged accident, and continuously thereafter, the defendant J. A. Jones Construction Company has had and now has general offices, officers, and agents upon whom leading process may lawfully be served in Roane County, Tennessee. Accordingly, the Chancery Court of Hawkins County, Tennessee, does not have jurisdiction of the cause of action alleged in complainant's original bill, or of these defendants, the venue of said alleged cause of action being limited to Roane County, Tennessee (Brown *vs.* Stone & Webster Engineering Corporation, 181 Tenn., 293).

2. The defendant J. A. Jones Construction Company at the time of the filing of this suit or of the service of process, was not to be found in Hawkins County, Tennessee, process having been served upon it in Knox County, Tennessee.

Wherefore, the defendants pray that complainant's suit be abated.

(Signed) CLYDE W. KEY,
Solicitor for Defendants.

STATE OF TENNESSEE,
Knox Count, ss:

Clyde W. Key makes oath that he is attorney and agent of the defendants J. A. Jones Construction Company, a corporation, and Aetna Casualty & Surety Company, a corporation, and duly authorized in the premises, and that the averments of the foregoing plea in abatement are true in substance and in fact.

(Signed) CLYDE W. KEY.

Sworn to and subscribed before me, this April 18, 1946.

(Signed) OVA M. PEDIGO,
Notary Public.

[SEAL.]

Attest: I certify that the foregoing is a true copy. This July 30, 1946.

(S.) JUNO G. ALTOM,
Clerk & Master.

[SEAL.]

EXHIBIT "C"

No. 62

IN THE CIRCUIT COURT OF HAWKINS COUNTY, TENNESSEE

FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

and

No. 1565

IN THE CHANCERY COURT OF HAWKINS COUNTY, TENNESSEE

MRS. FANNIE M. FLOWERS,

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

STIPULATION

It is stipulated and agreed by and between counsel for the respective parties that the deposition of Captain Frank A. Inda, who now resides in Rochester, New York, a witness in behalf of the defendants, may be taken before any Notary Public of the State of New York at such time and place as may be convenient to the witness and to counsel for defendants, without any further notice to counsel for plaintiff. In the taking of said deposition all formalities as to caption, certificate, transmission, etc., are waived, and it is agreed that the deposition, when taken pursuant to this stipulation, may be introduced in evidence upon all trials of each of these cases, subject to exception only for incompetency, irrelevancy and immateriality of testimony.

It is further stipulated and agreed that after said witness has been examined orally and his testimony transcribed, counsel for the plaintiff shall be afforded the opportunity of examining such transcript, and to thereupon submit such cross-interrogatories as they may desire, which cross-inter-

rogatories are to be answered by the witness, and such cross-interrogatories, together with the witness' answers thereto, shall be and become a part of the deposition of the witness.

This August 9, 1946.

(S.) PORTRUM & PORTRUM,

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Counsel for Plaintiff.
Counsel for Defendants.

CERTIFICATE

This is to certify that the foregoing stipulation was executed in triplicate on August 9, 1946, of which the above is a true copy.

This September 5, 1946.

———,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 432.—October Term, 1946.

Aetna Casualty & Surety Company and J. A. Jones Construction Company, Petitioners, v. Mrs. Fannie M. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 10, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This action for death benefits under the Workmen's Compensation Law of Tennessee (Tenn. Code Ann. 1934, § 6851 *et seq.*) was commenced in 1945 by plaintiff-respondent in the Chancery Court of Hawkins County, Tennessee. The defendants-petitioners are the former employer of her deceased husband and the employer's insurance carrier. Service was had on the insurance carrier in Hawkins County, and on the employer in Knox County. Respondent is a citizen of Tennessee, the employer is a North Carolina corporation, and the insurance carrier is a Connecticut corporation. The complaint alleged that respondent's husband died as the result of an accident occurring in the course of his employment. Burial expenses plus benefits in the amount of $5,000, the maximum under the Tennessee statute,[1] were sought on

[1] Death benefits are provided in the amount of 60% of the average weekly wages of the employee (as computed in accordance with Tenn. Code § 6852 (c)), but payments may not exceed $18 per week, nor continue for more than 400 weeks. § 6880; § 6883 (17). In addition there is a ceiling of $5,000 on total benefits exclusive of burial and certain other expenses. § 6881. See *Haynes v. Columbia Pictures Corp.*, 178 Tenn. 648, 162 S. W. 2d 383. The complaint alleged that 60% of the average weekly wages for the statutory period would exceed $5,000.

behalf of respondent and her two minor children, aged twelve and fifteen.

On May 28, 1945, petitioners mailed a notice of intention to file a petition for removal to a federal District Court which was received by respondent's attorney on the morning of May 29. The petition for removal was filed in the Chancery Court the same day, and on June 5, the removal order issued. In the federal court the petitioners moved for dismissal on the ground that venue was not properly laid in the Hawkins County Court, so that under Tennessee law that court had lacked jurisdiction.[1] Respondent sought a remand of the case to the state court, contending that the requisites of diversity jurisdiction had not been met either as to jurisdictional amount, or as to proper notice of filing of the removal petition and that the suit was not removable because not one of a civil nature in law or equity. The District Court concluded that Hawkins County was not the proper venue. It thereupon dismissed the action without reaching the questions raised by respondent's motion for a remand.

The judgment was reversed on appeal. 154 F. 2d 881. The Circuit Court of Appeals held that the jurisdictional minimum of $3,000 in controversy (Judicial Code § 24, 28 U. S. C. § 41 (1)) was not present, and therefore ordered the case remanded to the state court. In this disposition the Circuit Court of Appeals reached neither the state venue question raised by petitioners, nor respondent's contention that the required notice of the filing of the removal petition was lacking. We granted certiorari because of an apparent conflict with *Brotherhood of Locomotive Firemen* v. *Pinkston*, 293 U. S. 96, as to the jurisdictional minimum requirement.

[1] The contention was that proper venue lay only in Roane County where, it was alleged, the accident occurred and the business of the employer is conducted. It was argued that service on the insurer in Hawkins County did not give the Hawkins County Court jurisdiction of the case.

First. It is suggested that a decision of a Circuit Court of Appeals ordering remand of a case to a state court is not reviewable. And it is also said that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court.

An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here. Judicial Code § 28, 28 U. S. C. § 71; *Kloeb* v. *Armour & Co.*, 311 U. S. 199; *Metropolitan Casualty Ins. Co.* v. *Stevens*, 312 U. S. 563; *United States* v. *Rice*, 327 U. S. 742. But no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to a state court. *Gay* v. *Ruff*, 292 U. S. 25. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction. *Carr* v. *Zaja*, 283 U. S. 52, and cases cited.

Second. We think that the jurisdictional amount of $3,000 was involved in this suit. The contrary conclusion of the Circuit Court of Appeals was based on the nature of the award under the Tennessee statute. The award may be paid in installments at regular intervals by the employer or by a trustee with whom the amount of the award, reduced to present value, has been deposited. Tenn. Code § 6893. Moreover, the death or remarriage of respondent, plus the death or attainment of the age of eighteen by the children, would terminate all payments. Tenn. Code § 6883. Since an award to respondent would be payable in installments, and by operation of conditions subsequent the total payments might never reach $3,000, the Circuit Court of Appeals concluded that the jurisdictional amount was lacking.

If this case were one where judgment could be entered only for the installments due at the commencement of the suit (cf. *New York Life Ins. Co.* v. *Viglas*, 297 U. S.

672, 678), future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued. *Wright* v. *Mutual Life Ins. Co.*, 49 F. 2d 117, aff'd. 276 U. S. 602. Cf. *Button* v. *Mutual Life Ins. Co.*, 48 F. Supp. 168. But this is not that type of case. For the Tennessee statute which creates liability for the award contemplate a single action for the determination of claimant's right to benefits and a single judgment for the award granted. See Tenn. Code §§ 6880, 6881, 6890, 6891, 6893; *Shockley* v. *Morristown Produce & Ice Co.*, 171 Tenn. 591, 106 S. W. 2d 562.

Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction. It has held that a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial if the right to all the payments is in issue. *Brotherhood of Locomotive Firemen* v. *Pinkston*, *supra*; *Thompson* v. *Thompson*, 226 U. S. 551. Future payments are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. *Thompson* v. *Thompson*, *supra*, p. 560. And there is no suggestion that by reason of life expectancy or law of averages the maximum amount recoverable can be expected to fall below the jurisdictional minimum. Cf. *Brotherhood of Locomotive Firemen* v. *Pinkston*, *supra*, p. 101. Moreover, the computation of the maximum amount recoverable is not complicated by the necessity of determining the life expectancy of respondent.[3] Cf. *Thompson* v. *Thompson*, *supra*, p. 559; *Brotherhood of Locomotive Firemen* v. *Pinkston*, p. 100.

[3] See note 1, *supra*.

Third. Respondent, as is her right, *United States* v. *Ballard*, 322 U. S. 78, 88, and cases cited, seeks to support the action of the Circuit Court of Appeals on other grounds. But those questions were not passed upon by that court nor adequately presented here. So we deem it more appropriate to remand the case to the Circuit Court of Appeals so it may consider those questions. *United States* v. *Ballard*, *supra*.

Reversed.